United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1210

To be argued by
HARRY R. POLLAK

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P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

- against -

AL TAYLOR, et al.

Defendants-Appellants

BRIEF FOR DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
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THE UNITED STATES OF AMERICA

Plaintiff-Appellee

- against -

AL TAYLOR, et al.

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court abused its discretion and erred in failing to advise the jury that they could not infer that the Henry Salley referred to in the Pannirello testimony was the same Henry Salley present in the courtroom as a defendant.

2. Whether the sentence imposed upon Henry Salley as a result of his retrial was more severe than the prior sentence under all the circumstances.

3. All other issues raised in the briefs of the other Appellants.

STATEMENT OF FACTS

Henry Salley was originally one of many defendants indicted and charged with conspiracy in a wide spread narcotics conspiracy which originally came to the attention of this Court in the appeal in *United States v. Tramunti*, 513 F2d 1087. Salley was convicted in the *Tramunti* case of conspiracy (he had not been charged in any substantive counts) and he was sentenced to a five year term of imprisonment. Salley's conviction was reversed by this Court and the case against him remanded for a new trial.

Following various superceding indictments, Salley was retried once again with a large number of co-defendants, twelve of whom were actually tried in the case now on appeal. In the latest superceding indictment, Salley was charged with participating in the same conspiracy initially alleged in the *Tramunti* indictment and also with one substantive count. The jury convicted Salley of participating in the conspiracy but acquitted him under the one substantive count.

In the original trial, the only evidence of participation by Salley in the conspiracy was by two witnesses (Pannirello and Provitera) who testified that Salley had come to a Howard Johnson Motel in New Jersey on either one, two or three occasions and had picked up drugs from Provitera on one of these occasions.

The testimony in the first trial (*Tramunti*) was that Pannirello, who testified that he was in charge of what can best be termed as a retail outlet in New Jersey for the dis-

tribution of drugs, met Salley on one occasion in the fall of 1972 (neither he nor Provitera could pinpoint the dates with any exactness) and that, on that occasion, Pannirello and Provitera had spent about forty-five (45) minutes in a restaurant at the Howard Johnson Motor Lodge with Salley and that, immediately thereafter, Salley was present when, in a room of the motel, Robinson joined them for a discussion about drugs with Pannirello. Pannirello testified that he never saw Salley after that one occasion. Pannirello was unable to identify Salley in the courtroom.

Provitera's testimony was that he had met Salley on three occasions and that Pannirello had been there on two of those occasions. He identified Salley in the courtroom. On his first meeting with Salley, Provitera says he was introduced by Robinson to Salley and told that Salley would accept deliveries from him. Provitera had earlier in his testimony identified himself and his role as being the pickup and delivery man for Pannirello's drug operation. Provitera testified that he saw Salley a second time when he gave him a package. At his second meeting with Salley, no one else was present although Provitera had testified that Pannirello had been present at the first meeting. Provitera testified that he gave Salley a package at this second meeting and merely told him that Harry would be in touch with Robinson whom he referred to as "Allen". Apparently there was no conversation about drugs and no money changed hands. At his third meeting with Salley, Provitera substantially related the same incidents that Pannirello had described about

the restaurant and the motel room. Again, on this occasion, there was no testimony that Salley discussed drugs or handled drugs or money.

In a Wade Hearing at the original trial, the witness Provitera admitted that he had been shown a series of photographs which were offered in evidence at the Wade Hearing and in which Salley's photograph was much larger than the others and was also the only photograph that was not a mug shot. While on the appeal from the first conviction, it was urged that this photographic spread tainted Provitera's in-court identification of Salley, this Court, while agreeing that the photographic spread was highly suggestive, found that Provitera had enough opportunity to observe Salley so as not to have his in-court identification tainted by the suggestive photographic spread.

In the second trial, Pannirello and Provitera substantially testified in the same manner as originally at the first trial. Provitera again made an in-court identification and the Court ruled that, based upon his failure to identify Salley two years previously, Pannirello was not to be allowed to attempt an in-court identification (1898).

Thereafter, defense counsel made an application to have the jury instructed that they were not to infer from Pannirello's testimony that the person referred to in that testimony as Henry Salley was the defendant Henry Salley who was on trial and this application for such a limiting instruction was denied by the Court (2111-15).

The witnesses March, Dawson and Ellis also made mention of Henry Salley and were able to identify him (they were all acquainted with him for some time). Dawson and Ellis merely testified that Salley was present on one or more occasions in his own apartment while others were mixing narcotics. March likewise testified to Salley's presence in Salley's apartment on such occasions and also testified that he had accompanied Salley on one occasion where Salley got out of the car, returned with money and informed March that the money was in payment of a prior narcotics transaction (at the Grand Jury, March had given a different version alleging that he had seen Salley deliver narcotics and receive money, but he recanted this testimony terming it a "mistake").

ARGUMENT

POINT I

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FAIL TO ADVISE THE JURY, UPON TIMELY APPLICATION FROM DEFENSE COUNSEL, THAT THEY COULD NOT INFER THAT THE HENRY SALLEY REFERRED TO IN PANNIRELLO'S TESTIMONY WAS THE SAME HENRY SALLEY PRESENT IN THE COURTROOM AS THE DEFENDANT.

It is well understood that in order to convict a person of a crime the prosecution has the burden of proving all the elements of a crime including that of identification. There must be conclusive proof that the person charged with the alleged offense is in fact the perpetrator of the crime.

In an effort to determine this question of fact the jury must follow the Court's instructions as to the manner in which they may consider evidence of identification connecting the defendant with the crime that is charged.

In the case at hand the situation arose wherein Harry Pannirello, an unindicted co-conspirator testifying on behalf of the government, attempted to make an in-court identification of the defendant Henry Salley connecting him with various narcotics transactions. This particular witness had been unable to make such identification during the previous trial two years before and was, at the discretion of the Trial Court, upon timely objection from defense counsel, prohibited from attempting an in-court identification of the defendant at the second trial.

The Trial Court, upon timely request from defense counsel, overruled an application that the jury be advised that as a result of the inability of the witness to identify the defendant they were not to infer that the Henry Salley referred to in the witness's testimony was the same Henry Salley sitting in Court as the defendant. It is respectfully urged that it was an abuse of discretion for the Trial Court not to so advise the jury.

In the case of *Norman Salley v. United States, 353 F2d 897 (U.S. Court of Appeals, D.C. Circuit, 1965)*, the Court ruled that in a narcotics case where the issue of the defendant's identity comes into play the Trial Court must, at the request of defense counsel, instruct the jury as to the issue of the defense of mistaken identity and that [illegible]uested instruction specifically bringing this defense of mistaken identity to the jury's attention must be given" id. at 899. The Court of Appeals in that case reversed the conviction of the defendant as a result of the Trial Court's failure to so instruct the jury. In the case of *Jones v. United States, 361 F2d 537 (U.S. Court of Appeals, D.C. Circuit, 1966)*, the Court limited its ruling in the Salley case to situations where narcotics transactions were involved. It was the Court's opinion that instructions of the type required by the Salley decision were to be limited to situations wherein undercover agents are used to purchase narcoti In such situations it was felt that such instructions were neces- sary because of the numerous transactions that such agents might be involved with over a long period of time, there was a possibi

of mistaken identity which should be taken into consideration by the jury upon request of the defense counsel.

"Our concern of a possible error of memory on the part of an undercover narcotics agent attempting to isolate in his recollection the identity of one participant in as many as 100 similar transactions does not stretch to the same degree of concern to the reliability of the memory of a robbery victim who had the opportunity to see the face and physical characteristics of his assailant. We accordingly regard the doctrine of the Salley case as addressed specifically to the questions therein presented, id. at identification in multiple unrelated narcotics purchases." Id. at 542.

It is respectfully urged that the Salley doctrine requiring proper instructions as regards identification in narcotics cases be applied to witnesses in such cases who are acting under color of governmental authority, as was the witness Pannirello in this case. Such witnesses might be subject to the same difficulties as undercover narcotics agents in the area of identification. In this case the witness Pannirello was a large scale narcotics dealer who in his testimony described numerous narcotics transactions only one of which allegedly involved a person named Henry Salley. Pannirello, therefore, at best, was in the same situation with respect to identifying someone with whom he had dealt as would be a government undercover agent who had made a number of transactions. In fact, however, Pannirello, lacking the training of a government agent and not knowing that he would eventually have to identify those persons whom he was dealing with in Court, was a far more unreliable witness than a trained government undercover narcotics agent.

The Court in *Jones* further stated that in cases other than narcotics cases where the issue of identification was brought

into question by the defense the Trial Court should specifically instruct the jury in some manner that the evidence of identification is an issue which must be resolved by the jury. the Court stated as follows: "Such special instructions should point out to the jury that the evidence raises the question of whether the defendant was in fact the criminal actor and necessitates the jurors resolving any conflict of testimony upon this issue. The instructions should of course point out that the burden of proof is upon the prosecution with reference to every element of the crime charged and this burden includes proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged". Id. supra.

Other circuit courts of appeal have similarly recognized the need for trial courts to properly instruct juries on the issue of identification. In the case of *United States v. Levi, 405 F2d 380 (U.S. Court of Appeals, 4th Circuit, 1968)*, the Court adopted the suggestion of the D.C. Circuit in the *Jones* case. The Court here stated that when the defendant has placed his identification in issue, it is incumbant upon the Trial Court, on request from defense counsel, to instruct the jury in the following manner:

"1. That the evidence raises a question whether the defendant was in fact the criminal actor and necessitates jurors resolving any conflict of testimony upon this issue; and
2. That the burden of proof is upon the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged". Id. at 383.

In the case of *United States v. Barber, 442 F2d 517 (U.S. Court of Appeals, 3rd Circuit, 1971)*, the Court recognized the need for extreme care in the area of identification. Thus the Court adopted the approach of the Pennsylvania courts in instructing jurors in the area of identification. It was the

Court's opinion that the jury was to consider four questions concerning the issue of identification in making their determination of fact:

1. Did the witness have an adequate opportunity to observe the accused?

2. Was the witness positive in his identification?

3. Was the witnesses identification testimony weakened by a prior failure to identify the defendant or by prior inconsistent identification?

4. Did the witness remain positive in his testimony after cross examination? Id. at 528.

It was the opinion of the Court that in the absence of any of these four conditions the jury was to be admonished by the Court that the witnesses testimony as to identity must be received with caution and scrutinized with care. In the case of *Government of the Virgin Islands v. Peterson, 507 F2d 898 (U.S. Court of Appeals, 3rd Circuit, 1975)*, the Court reaffirmed its adherence to the manner in which identification testimony was to be treated as they had previously stated in *United States v. Barber, supra.* The testimony of eye witnesses must be "received with caution and scrutinized with care", id. at 901.

The necessity for the Trial Court to instruct the jury as to caution and scrutiny in the area of identification was further pointed out in the case of *United States v. Telfaire, 469 F2d 552 (U.S. Court of Appeals, D.C. Circuit, 1972).* In that case the Court adopted the model instructions on identification

which the Court strongly suggested for use by trial courts in that Circuit. The Court felt that jurors should consider several items in appraising identification testimony of a witness. Firstly, the Court felt that the jurors should be convinced as to the capacity and adequate opportunity of the witness to observe the offender. Secondly, the jurors were to be instructed that identifications made by the witness subsequent to the offense were the product of the witness's recollection. Thirdly, the jury was to take into account any occasions upon which the witness failed to identify the defendant or made an identification inconsistent with the identification at trial. Fourth and finally, the jurors were to consider the credibility of each identifying witness in the same way as any other witness as to truth, capacity and opportunity to make a reliable observation on the matter that the witness testified to, id. at 599.

The failure of the Trial Court to advise the jury in accordance with the timely application of the defense counsel as to how the jurors should consider the testimony of the witness Pannirello in light of the Trial Court's decision to prohibit the witness from making an in-court identification of the defendant-appellant has resulted in substantial prejudice to the defendant. This is apparent when viewed in the light of the aforementioned cases. In the case of *United States v. Barber, supra*, the Court established four standards by which identification testimony could be viewed by a jury. The Court there indicated that a failure to meet any of the four criteria should be cause

for the jury to view the testimony as to identity with scrutiny and care. One of the criteria requires that the witnesses identification testimony cannot be weakened by prior failure to identify or by prior inconsistent identification. It is clear that if a trial court refused to so instruct in the 3rd Circuit upon request from defense counsel, in connection with identification testimony, substantial prejudice would arise against the target of the identification. It is respectfully urged that such prejudice did arise in the case at hand where the Trial Court failed to caution the jury in any manner as to how they should view the identification testimony of the witness Pannirello in denying the timely application of the defense counsel requesting the Trial Court to so advise.

In the case of *United States v. Telfaire, supra,* the model jury instruction adopted by the Court in regard to identification testimony was once again indicative of the possible prejudice that can arise in a case wherein the jury is not properly cautioned as to the manner in which they may consider identification testimony. As part of the model instruction the Court there states that the jurors may "take into account any occasions in which the witness failed to make an identification of defendant or made an identification that was inconsistent with his identification at trial", id. at 599. The case of *United States v. Levi, supra,* is also indicative of the necessity of the Trial Court to properly advise or instruct the jury as to how they might consider identification testimony. The Court here

indicated that it was required that the Trial Court specifically instruct the jury upon request from defense counsel that they were to "resolve any conflict in testimony upon this issue", that is identification, id. at 383.

It is respectfully urged that while no special instruction was requested by defense counsel in connection with the witness Pannirello's testimony at the time the jury was being charged, the timely application of defense counsel to the Trial Court to advise the jury in connection with this matter, was sufficient to meet the obligations of defense counsel in this regard. The failure of the Trial Court, therefore, to advise the jury as to the manner in which they should consider the testimony of the witness Pannirello has resulted in substantial prejudice requiring a reversal in the interests of justice.

POINT II

THE TRIAL COURT IN SENTENCING THE DEFENDANT-APPELLANT HENRY SALLEY TO A TERM OF IMPRISONMENT OF FIVE YEARS HAS IN EFFECT SENTENCED THE DEFENDANT TO A MORE SEVERE TERM OF IMPRISONMENT THAN THE DEFENDANT HAD PREVIOUSLY RECEIVED AS A RESULT OF HIS CONVICTION ON THE SAME CHARGES IN HIS FIRST TRIAL.

While the Trial Court had acted properly and in accordance with law in sentencing the defendant-appellant Henry Salley to a term of imprisonment of five years, it is respectfully urged that such sentence, while within the legal and constitutional bounds of the law, was in effect a more severe sentence than the one which had been previously imposed.

In the case of *North Carolina v. Pierce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 1969*, the United States Supreme Court determined that where a defendant had been convicted of the same offense on a second occasion and had served prior time in prison for such offense upon conviction for this offense in a second trial, defendant must be credited with time served, including whatever time off for good behavior the defendant had previously been credited with. In this case the defendant has already served fourteen (14) months of his sentence under the first overturned conviction. The defendant will be eligible for parole in six months upon reentry into confinement. It is possible that the defendant may not receive the same consideration for parole he would have received had he remained in confinment under the first conviction and sentence. Thus a possible denial of parole would force the defendant to remain in confinment for a

longer period of time that he might have remained had he not exercised his constitutional right of appeal under the 14th Amendment as was stated in *North Carolina v. Pierce, supra,* at 722.

It is respectfully urged that the Trial Court has abused its discretion in this case, and that it has failed to take into consideration the totality of the circumstances involved in this case. In the case of *Jones v. United States, 327 F2d 867 (U.S. Court of Appeals, D.C. Circuit, 1963)*, the Court found that it was within the judge's discretion to consider the circumstances in mitigation and aggravation and to make a determination as to the justification of a sentence, id. at 871. Furthermore, the Court stated in *Genet v. United States, 375 U.S. 960*, that "it is always the duty of a sentencing judge to consider both the crime and the person committing the crime when determining a just sentence". In this case the defendant has in the interim between the two trials developed ties to his community as well as steady employment. It would serve no useful purpose to interrupt the defendant's life for a second time in that imprisonment might well harm the efforts defendant has made at self-rehabilitation. The defendant has a worthy background in that he is a wounded veteran entitled to a disability pension from the Veterans Administration. He had been steadily employed for many years in the District of Columbia Railroad System and it was only during the period of his unemployment wherein the defendant became involved with crime. Since the defendant is no longer unemployed in that he is presently working despite medical advice

that he should not undertake work and since he no longer has any connections with any of the criminal elements that he was previously involved with it is respectfully urged that no purpose would be served through reconfining the defendant at this stage.

It is urged that the Appellate Court should undertake its authority to review the sentencing procedures of the Trial Court. In the case of *United States v. Dancy, 510 F2d 779 (U.S. Court of Appeals, D.C. Circuit, 1975)*, the Court determined that it was proper under certain circumstances for there to be appellate review of the Trial Court's sentencing procedures.

> "Careful appellate review of the judicial sentencing process does not impinge upon the trial judge's discretion to impose sentence within statutory limits. Rather, it simply aims to guarantee that the trial judge's sentencing discretion is actually exercised and that the information relied upon by him is not unreliable, improper or grossly insufficient."

As the transcript of the sentencing minutes for Henry Salley in the *Tramunti* case indicates (see docket 74-1550), the Trial Court, when it originally sentenced Henry Salley to a term of five years imprisonment had been influenced by the fact that the Trial Court felt that Salley had not testified truthfully. It would therefore follow that, had Salley not taken the stand in the original trial, he might have received a less severe sentence. Since the reversal by this Court wipes the slate clean for the new trial and since Salley did not take the stand at the second trial, it is also respectfully urged that the Court should not have imposed the same sentence as the one which was clearly influenced by what the Court regarded as perjury on

Salley's part.

It is therefore respectfully urged that the Trial Court's sentence be vacated in this case in the interest of compassion and justice.

POINT III

DEFENDANT-APPELLANT SALLEY JOINS IN AND ADOPTS THE ARGUMENTS ADVANCED BY ALL OTHER APPELLANTS ON ALL ISSUES RAISED IN THE BRIEFS OF SUCH APPELLANTS.

C O N C L U S I O N

The Judgment of Conviction should be reversed and the Indictment dismissed as against defendant-appellant Salley.

Dated: August 26, 1976
New York, New York

Respectfully submitted,

HARRY R. POLLAK
Attorney for Defendant-
Appellant Salley